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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 988

NEW YORK AND CUBA MAIL STEAMSHIP COMPANY,
Petitioner (Libellant-Appellee)

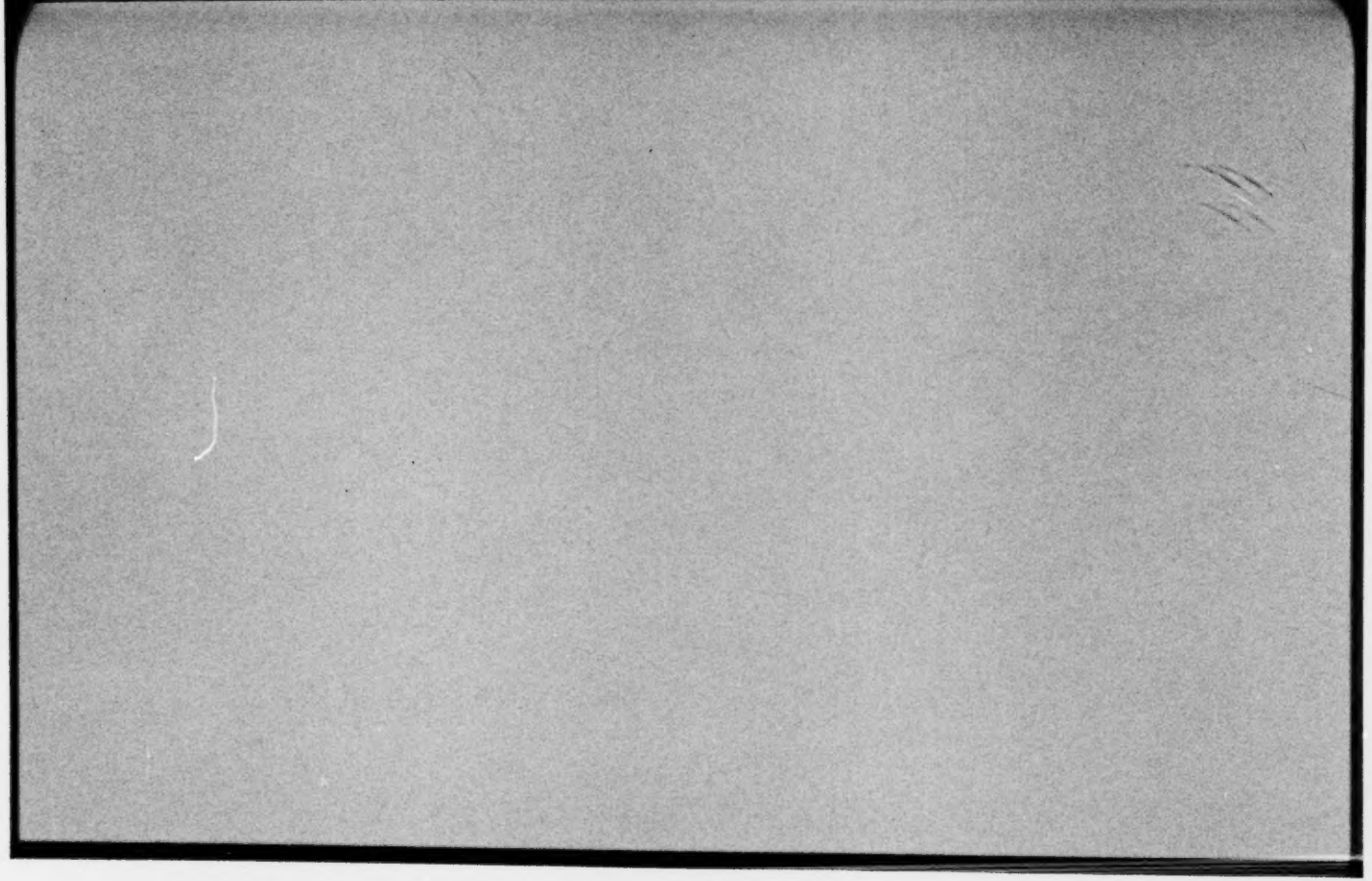
against

THE CONTINENTAL INSURANCE COMPANY
OF THE CITY OF NEW YORK,
Respondent (Respondent-Appellant)

REPLY BRIEF FOR PETITIONER TO RESPONDENT'S BRIEF OPPOSING PETITION

[redacted]

Post Printing Company, Inc., [redacted]



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NEW YORK AND CUBA MAIL STEAMSHIP COMPANY,
Petitioner (Libellant-Appellee)

AGAINST

THE CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK
Respondent (Respondent-Appellant)

REPLY BRIEF FOR PETITIONER TO RESPONDENT'S BRIEF OPPOSING PETITION

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, New York and Cuba Mail Steamship Company, respectfully submits the following comments in reply to respondent's brief.

Respondent errs widely in suggesting that the case involves mainly questions of fact. Reference to the Summary Statement and Questions Presented clearly shows the contrary. Neither do the several references to "concurrent Findings of both Courts" serve any purpose. The facts were fully settled by the District Court in accordance with Admiralty Rule 46½ (see Appendix A to Petition, 54-64). These findings were entitled to respect, but were

substantially disregarded by the Circuit Court of Appeals, notwithstanding that there was no basis in the evidence for disregarding or disturbing them.

There was nothing casual or ill-considered about the taking out of this insurance.

The policy in suit was secured in accordance with and as required by Sec. 11 (g) of the Merchant Marine Act, 1928, "An Act to further develop an American merchant marine, to assure its permanence", etc. (45 Stat. 689). The *Morro Castle* was built under this Act with aid of a construction loan, secured by a preferred mortgage to the Government. Section 3 of the mortgage provided (Ex. 80, R. 898):

"The Shipowner shall, at its own cost and expense, keep the vessel fully insured at all times in an amount at least equal to the full commercial value of the vessel on full form policies. The amount of insurance, the terms of the policies, the risks covered and the insurance companies or underwriting funds shall at all times be satisfactory to the Board. * * *

Among the forms of insurance which the Shipowner shall obtain pursuant to this Section, the Shipowner shall keep the vessel fully entered in a Protection and Indemnity Association or Club approved by the Mortgagee in both protection and indemnity classes, or shall keep the vessel fully covered by protection and indemnity clauses in a policy or policies of insurance satisfactory to the Mortgagee, and such protection and indemnity insurance shall also protect the Mortgagee against any liability which it may incur as Mortgagee or otherwise. * * *

(a) All policies of insurance covering the vessel shall be taken out in the name of the Shipowner for account of whom it may concern, and such policies shall be made payable to the Board for distribution by it to the Board and/or the Owner as their respective interests may appear.

(b) All policies and cover notes shall be delivered to the Board, for its approval and custody. * * *."

The *Morro Castle* P. & I. policy in suit was delivered to and approved by the Department of Commerce as successor to the Shipping Board, and any loss was payable to "the Department of Commerce for distribution by it to mortgagor and mortgagee as their respective interests may appear" (R. 824). Not only was the policy form satisfactory to that Governmental authority which administered the statute for protection of the Government's interest, but the same policy was regularly accepted as due protection by the Government in many other instances, and by great numbers of shipowners. There is no evidence whatever that any other form different in substance was or would be issued by respondent, or by any other underwriter, in respect of a risk situation like that of the *Morro Castle*.

The classification made by respondent as between an "all-risk" and "limited" policy (Brief, 1-3) is fanciful, to say the least. The three cases respondent cites give no support to its contention. The courts which decided them did not intimate a consciousness of any such distinction. On the contrary, they speak of "fraud or willful exposure to known danger," etc., etc. as a defense. See 20 F. (2d) at 643, 644. *Orient Ins. Co.* v. *Adams*, 123, U. S. 67, is there cited, where this Court declined to elevate a remote cause of loss to the status of privity.

In the *Sorenson* case, 20 F. (2d) 640, 641, the policy was a "steamer cargo" policy covering "risk of fire, and/or inland navigation and/or transportation * * * including general average and salvage * * *", also carrier's legal liability. The *Eagle* case policies specified the "protection and indemnity" risks covered. 9 F. (2d) 296, 297. The *Hanover* case policy was also a "protection and indemnity" policy with risks specified, described by the Court as "a

form of policy * * * now in common use". 15 F. (2d) 946, 947.

When this case was in the making in the District Court, respondent contended at page 54 of its brief there that a policy stating in so many words "that it protected libellant against the deliberate acts of the libellant and its Managing Officers in breaching every statute and regulation with respect to safety at sea and constituting criminal neglect" would be void as against public policy—thus then seeking to assimilate the policy at bar to such an imagined type of policy, which clearly it is not.

The question here concerns the policy that was actually used by practical people, not some other form that could have been devised.

Respondent's statement (Brief, 4) that the *Morro Castle* might have done damage exceeding $4,600,000 (assuming a collision with the *Queen Mary*!) misses the point of petitioner's argument. If, as respondent contends, the policy covered only liability that could be limited against under the statute, then the limitation value—value of the vessel after the disaster—would have been the limit of liability under the policy, and there would have been no justification for paying premiums on $4,600,000.

Respondent's statement at Brief 6 is incorrect, that *three* managing officers of petitioner's organization were found "guilty of privity and neglect." As to Mooney, the Circuit Court of Appeals only said: "The president of libellant, a Mr. Mooney saw one drill, but was not called." It made no finding of privity on the part of Mooney. The District Court had expressly found that Mooney had not become aware of any improper drills (Appendix to Petition, 61-2).

There was no evidence whatever that he had ever seen any drill.

As to Cabaud, the District Court found that proper instructions had been given as to division of sailors into watches, fire and boat drills, entries in log books, watchmen and observance of other safety statutes and regulations and that the violations of instructions which occurred on board the vessel were not known to Cabaud. See Findings 11, 12 and 18 in Appendix to Petition. The Circuit Court of Appeals made no finding to the contrary. It rested its decision on its view that Cabaud should not have relied on others, but should have investigated for himself.

Contrary to the findings of the District Court the Circuit Court of Appeals considered Torresson guilty of negligence. But since he was not a managing officer, his negligence did not bar recovery under the *policy* as in effect at the time of the fire, notwithstanding that negligence on his part might have prevented limitation of liability under the *statute,* i.e., had that proposition been in issue.

Respondent's reference at Brief 6 to managing officers of petitioner's "organization," if directed to displacing well understood classifications, would appear to be a boomerang. In the Century Dictionary "organization" is stated to be "often used specifically of an organized body of persons, as a literary society, club, corporation, etc." Petitioner is a corporation, and marine superintendent Torresson was not an officer of said corporation. What gain respondent seeks by the distinction between "corporation" and "organization" is not apparent: in respect of either description the amendment of the policy *after the fire* so as to specify "managing agent" must be deemed to have had

a substantial purpose, i.e., bringing in under the description of "managing *agent*" a person not previously in under the description of "managing *officer*."

Respondent's comment (Brief, 8) on the observations made by the Circuit Court of Appeals to effect that the logs showed violations disregards the fact (as did the Court below) that no statute or regulation required any log entry on the subject of division of watches. The utmost that the Court could properly have said was that the logs did not show *whether or not* the statute was being complied with—in the very nature of things this cannot import notice of a violation. If violations had been disclosed by the logs it is odd that they should not have been picked up by the U. S. Local Inspectors when holding their inspections. Neither the Court below nor the respondent have suggested that the Inspectors did not perform their statutory duties.

The writing of a detailed entry in a log is not proof of what was in fact done, and the converse is true. For illustration we refer to the log entry for the quarterly inspection held on the *Morro Castle* August 4, 1934 (Ex. J-3, R. 1366), which reads:

"10 A. M. Held fire and boat drill under supervision of United States Local Inspectors, Captain Moffat and Mr. Martin."

The two inspectors there mentioned, Captain Moffat and Mr. Martin, testified at the trial, and their testimony shows that very much more was in fact done than the log entry specifies (R. 665-6, 669; R. 775).

In the second paragraph on page 8 of its Brief respondent misdescribes the statement at page 23 of the petition

concerning the 1935 policy amendment whereby a "managing agent" was specifically included as one whose "actual fault or privity" would defeat recovery, etc. Respondent by speaking here of "negligence" (instead of "actual fault or privity") imputes to petitioner an argument it has not made. Without negligence on the part of somebody imputable to the assured no question of liability could ever arise under a liability insurance policy. Such a policy is necessarily in a class by itself and its highly special purpose simply cannot be served if negligence is a defense to the underwriter—or if there is any defense short of something amounting substantially to fraud, willful or deliberate wrong—in the sense shown by the *Sorenson* case *supra* and authorities there discussed.

Respondent does not grapple with the statement of questions presented (Petition, 19) and reasons relied on for granting of the writ (Petition, 20-32), but confines itself to comments which are collateral and irrelevant as against the substantial question squarely presented by the petition —whether a *contract* for protection and indemnity insurance is defeated because of inability of an assured (not guilty of fraud or willful or deliberate wrong causing the loss) to limit liability under the *statute*.* The decision below makes

* The Circuit Court of Appeals assumed that petitioner could not have limited its liability under R. S. 4283 because of privity on the part of marine superintendent Torresson. The District Court had found there was no privity and its decision was on the basis that limitation was prevented by R. S. 4493 because of statutory violations that had taken place on shipboard.

In *Sabine Towing Co.* v. *Continental Ins. Co.* referred to at page 21 of the petition, limitation of liability had been denied by the District Court because of privity of the president of the company. We are informed that the petition in that case is now on file in this Court under Docket No. 987.

the insurance nothing more than a sham and a reproach, and its correction is of transcendent importance.

It is respectfully submitted that the writ should be granted.

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CHAUNCEY I. CLARK
Counsel for Petitioner

New York City
May 9, 1941.